IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

TOMAS C. GUTIERRES ET AL., APPELLANTS, v. ALBUQUERQUE LAND AND IRRIGATION COMPANY.	*No.* 85.

BRIEF OF APPELLEE.

I.

Appellee deems it unnecessary to make any statement of facts in this case. Counsel for appellants, on page 13 of his brief, has stated that "we are concerned with only "the fourteenth, fifteenth, sixteenth, and eighteenth find-"ings of fact by the court below," and quotes them. Upon those he bases his contention, and it is unnecessary to repeat them. We therefore proceed to discuss the propositions of law raised by appellants, and refer to the findings and opinion of the court below for a statement of the facts.

II.

This court has no jurisdiction to hear and determine this case. Counsel for appellants contend that jurisdiction is vested in this court under the act of March 3, 1883 (23 Stats. at Large, 443), because "the validity of a "treaty" of the United States and of "an authority exer- "cised under the United States is called in question."

There is no affidavit or other proof in the record to show that *the matter in dispute, exclusive of costs*, exceeds the sum of five thousand dollars. The jurisdiction must therefore depend upon the nature of the questions involved.

Under the decisions of this court it is clear the validity of the treaty of Guadalupe Hidalgo is not involved.

The supreme court of New Mexico has not held that treaty to be invalid. A construction of the treaty or of a statute, or of rights claimed thereunder, is not a holding that the treaty or statute is invalid.

Ferry *v.* King County, 141 U. S. 668.

In Baltimore and Potomac Railroad *v.* Hopkins, 130 U. S. 224, this court said:.

"Whenever the power to enact a statute, as it is by its "terms, or is made to read by construction, is fairly open "to denial and denied, the validity of such statute is drawn "in question, but not otherwise."

In Linford *v.* Ellison, 155 U. S. 508, this court discussed the jurisdiction under the act of 1885 fully and said:

"It is thus seen that the decision of the Supreme "Court of the Territory involved the construction of the "organic law and the scope of the authority to legislate con-

"ferred upon the Territorial Legislature; but that the va-
"lidity of that authority and of the statute was not drawn in
"question. In order to give us jurisdiction of this ap-
"peal the matter in dispute, exclusive of costs, must
"have exceeded the sum of $5,000, or else, without re-
"gard to the sum or value in dispute, the validity of a
"patent or copyright must have been involved, or the
"validity of a treaty or statute of, or an authority exer-
"cised under, the United States, have been drawn in
"question. (Act of March 3, 1885, C. 355, 23 Stat. 443.)
"Confessedly, the matter in dispute here did not reach
"the requisite pecuniary value, and the validity of no
"patent or copyright was involved, nor was the validity
"of a treaty questioned; and, as just stated, we are of
"opinion that the validity of no statute of the United
"States, nor of an authority exercised under the United
"States, was drawn in question within the intent and
"meaning of the jurisdictional act. As was observed in
"Lynch *v.* United States, 137 U. S. 280, 285: 'The valid-
"'ity of a statute is not drawn in question every time rights
"'claimed under such statute are controverted, nor is
"'the validity of an authority every time an act done by
"'such authority is disputed. The validity of a statute
"'or the validity of an authority is drawn in question
"'when the existence or constitutionality or legality of
"'such statute or authority is denied, and the denial
"'forms the subject of direct inquiry.' In Baltimore
"and Potomac Railroad *v.* Hopkins, 130 U. S. 210, the
"question in controversy was whether a railroad corpora-
"tion, authorized by acts of Congress to establish freight
"stations, and to lay as many tracks as 'its president and
"'board of directors might deem necessary' in the Dis-
"trict of Columbia, had the right to occupy a public street
"for the purposes of a freight yard. It was argued that the
"validity of an authority exercised under the United
"States to so occupy the public streets was drawn in
"question; but the courts held otherwise and said: 'The
"'validity of the statutes and the validity of the authority
"'exercised under them are in this instance one and the
"'same thing, and the "validity of a statute," as these words

" ' are used in this act of Congress, refers to the power of
" ' Congress to pass the particular statute at all, and not
" ' to mere judicial construction as contradistinguished
" ' from a denial of the legislative power.' And see South
' Carolina *v.* Seymour, 153 U. S. 353, where the cases
" are marshalled and applied."

The case cited above, South Carolina *v.* Seymour, fully reviews the decisions of this court. We respectfully submit that the treaty was not held invalid by the court below, and that the power of the Legislative Assembly of New Mexico to enact the legislation involved in this case was sustained, and that "no authority exercised under "the United States" by appellants was denied or questioned by the court below.

III.

The act of the Territorial Legislature authorizing the creation of corporations to construct and maintain reservoirs, ditches, and pipe lines, and conferring upon such corporations the right of eminent domain, is not an interference with the primary disposal of the soil.

Whenever the title has passed, been conveyed by the sovereign, and the land has become private property, "primary disposal of the soil has been made." Thereafter any legislation relating thereto does not "interfere "with the primary disposal of the soil."

Gibson *v.* Chouteau, 13 Wall. 99.
Henshaw *v.* Bissell, 18 Wall. 255.
King *v.* Thomas, 6 Montana, 409.

It would seem clear that this limitation upon the power of the legislature of a territory was intended to prohibit interference with the public lands; that when they be-

came private property, they became rightful subjects of legislation, "provided such legislation is" not inconsistent with the Constitution and laws of the United States.

Section 1851, of the Revised Statutes of the United States, is as follows:

"The legislative power of every Territory shall extend "to all rightful subjects of legislation not inconsistent "with the Constitution and laws of the United States. "But no law shall be passed interfering with the primary "disposal of the soil; no tax shall be imposed upon the "property of the United States; nor shall the property "or lands of non-residents be taxed higher than the "lands or other property of residents."

Rev. Stat. (U. S.) Sec. 1851.

In discussing the powers conferred by this section, this court has said:

"As a general thing subject to the general scheme "chalked out by the Organic Act, and such special pro- "visions as are contained therein, the local legislature "has been entrusted with the enactment of the entire "system of municipal laws, subject also, however, to the "right of Congress to revise, alter and revoke at its dis- "cretion. The powers thus exercised by the Territorial "Legislatures are nearly as extensive as those exercised "by any State legislature."

Hornbuckle *v.* Tooms, 18 Wallace, 655.

On the subject of eminent domain it has said:

"It is no longer an open question in this country that "the mode of exercising the right of eminent domain in "the absence of any provision in the organic law pre- "scribing a contrary course is within the discretion of "the legislature. There is no limitation upon the powers "of the legislature in this respect, if the purpose be a

" public one, and just compensation be paid or tendered
" to the owner for the property taken."
Lecombe *v.* R. Co., 23 Wall. 109.

Congress has expressly authorized Territorial Legislatures to create corporations by general law for purposes of irrigation.

" The legislative assemblies of the several Territories
" shall not grant private charters or especial privileges,
" but they may, by general incorporation acts, permit
" persons to associate themselves together as bodies cor-
" porate for mining, manufacturing, and other industrial
" pursuits, or the construction or operation of railroads,
" wagon-roads, irrigating ditches, and the colonization
" and improvement of lands in connection therewith, or
" for colleges, seminaries, churches, libraries, or any
" benevolent, charitable or scientific association."
Rev. Stat. (U. S.) Sec. 1889.

It would be impossible for the corporations authorized by this section to accomplish the objects of their creation unless vested with the right to condemn property whenever the use to which it is put is a public purpose.

Congress has expressly recognized the validity of local legislation by the act of 1866, Rev. Stat., Sec. 2339, appellants' brief, page 5.

All subsequent legislation, including the desert land act, quoted on pages 6 and 7 of appellants' brief, is a clear recognition of the authority in State as well as Territorial Legislatures to legislate on this subject.

And the act of 1891, which is quoted in appellants' brief, page 6, is also a direct recognition of the power of the legislature to legislate on this subject, and these statutes relate to the public lands. There are, however, no public lands involved in this controversy, but if there were this legislation as to water rights would be valid.

These acts have been frequently construed by this Court.

In Basey *v.* Gallagher, the court refers to the case last above cited, and says:

"* * * that the doctrines of the common law declaratory of the rights of riparian proprietors were "inapplicable, or applicable only to a limited extent, to "the necessities of miners, and were inadequate to their "protection; that the equality of right recognized by that "law among all the proprietors upon the same stream "would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance "for mining purposes to points from which it could not "be restored to the stream; that the Government, by its "silent acquiescence, had assented to and encouraged the "occupation of the public lands for mining; and that he "who first connected his labor with property thus situated and open to general exploration, did in natural "justice acquire a better right to its use and enjoyment "than others who had not given such labor; that the "miners on the public lands throughout the Pacific "States and Territories, by their customs, usages, and "regulations, had recognized the inherent justice of this "principle, and the principle itself was at an early period "recognized by legislation and enforced by the courts in "those States and Territories, and was finally approved "by the legislation of Congress in 1866. The views there "expressed and the rulings made are equally applicable "to the use of water on the public lands for purposes of "irrigation. No distinction is made in those States and "Territories by the custom of miners or settlers, or "by the courts, in the rights of the first appropriator "from the use made of the water, if the use be a beneficial one."

Basey *v.* Gallagher, 20 Wallace, 681–682.

See also

Jennison *v.* Kirk, 98 U. S. 453.
Broder *v.* Water Co., 101 U. S. 274.
Atcheson *v.* Petersen, 20 Wall. 513.

This court has also said:

"In other words, the United States by the section said "that whenever rights to the use of water by priority of "possession had become vested, and were recognized by "the local customs, laws, and decisions of the courts, the "owners and possessors should be protected in them, "*and that the right of way for ditches and canals incident* "*to such water rights, being recognized in the same man-* "*ner*, should be acknowledged and confirmed."

Jennison *v.* Kirk, 98 U. S. 460.

The validity of such legislation by a Territory has never been questioned. It has been expressly recognized.

See Sturr *v.* Beck, 113 U. S. 545.

IV.

There are no public lands involved in this controversy, and no land shown to have been acquired from the United States.

There is no finding of fact to such effect. It is said on page 29 of appellants' brief that the court takes judicial notice that "the water in the Rio Grande not held in "private ownership at the time of the cession became the "property of the United States. * * * And also that "the United States are the owners of lands in the valley of "the Rio Grande which are subject to entry under the "public land laws."

We do not understand that the appellants can ask the court to take judicial notice of such facts. There is no presumption of law that the title of lands in the Rio Grande valley was in the Republic of Mexico at the time of the cession.

This court knows from cases decided by it, and a glance

at the official map of the Territory will show that very large areas in the valley were covered by Spanish and Mexican grants. It also knows that a large part, probably the major part of the population of New Mexico, at the time of the acquisition of the Territory by the United States, was located in the Rio Grande valley and in that portion of the valley in central New Mexico where appellee's canal is located. The rule as to judicial notice is quite fully discussed by this court in the case of the U. S. v. Rio Grande Irrigation Co., 174 U. S. p. 690, and we respectfully submit that, according to the principles laid down in that case, the court could not take judicial notice of the title of any particular tracts or parcels of the land. The bill of complaint, as well as the finding of fact, shows that the head-gate of appellee's proposed canal is to be a mile below, or south of, the Indian Pueblo of San Felipe; the ultimate terminus near Isleta, which is also an Indian Pueblo, and that its present proposed terminus is at the city of Albuquerque, the distance from the proposed head-gate to the city of Albuquerque being about twenty-eight miles. An examination of the findings of fact will show that it will be impossible for the court to assume that this canal is to cross a single foot of public land.

We unhesitatingly assert that if the court will investigate this fact upon the theory of judicial notice it will find the fact to be that the canal does not cross any public land from its head-gate to the city of Albuquerque. There is no description in the pleadings or the findings of fact of what particular land the appellants claim, or their source of title. It is to be presumed from the contention of appellants in this case that their title, if any, came from Spain or Mexico. The appellants insist that they had vested rights in the land and water which are pro-

tected by the treaty of Guadaloupe-Hidalgo against any right which the legislature of New Mexico could confer upon the appellee to exercise the right of eminent domain or divert water. If this is true these lands must have been private property at the time of making of the treaty, and the laws of the United States applicable to the public domain can have no application.

The act of Congress of 1866, as well as desert land acts, apply only to the public domain.

Long on Irrigation, Sec. 30; Cruse *v.* McCauley, 96 Fed. 369.

Smith *v.* Denniff, 24 Mont. p. 20; 60 Pac. 398.

Carson *v.* Gentner, 33 Ore. 512; 52 Pac. 506.

V.

"Whether a particular region is a farming neighbor-
"hood, and whether the supplying of water to that neigh-
"borhood constitutes a public use, are questions of fact."

Long on Irrigation, Sec. 5, p. 14.

Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676.

Lux *v.* Haggin, 69 Cal. 255.

Aliso Water Co. *v.* Baker, 95 Cal. 268.

VI.

The doctrine of riparian rights has never prevailed in New Mexico, either under Mexico or the United States.

Long on Irrigation, Section 10:

"But common law as to rights of riparian owners is not
"in force in this Territory."

Trombley *v.* Luterman, 6 N. M. 16.

Milheiser *v.* Long, 61 Pacific Rep. 111.

Lux *v.* Haggin, 69 Cal. 255.

The Spanish and Mexican law existed in New Mexico, and continues to exist, except so far as changed by statute. That law as to water rights was based on the principle of prior appropriation. This principle was also early recognized by the Courts of the Pacific and Rocky Mountain States.

Barnett *v.* Barnett, 50 Pacific Rep. 338.

Especially

Insurance Co. *v.* Canter, 1 Pet. 544.
U. S. *v.* Percheman, 7 Peters, 82.
Mitchel *v.* U. S., 9 Peters, 729.
Railway Co. *v.* McGinn, 114 U. S. 546.
And the Insular Cases, 182 U. S.

The common law was enacted in New Mexico on January 7, 1876, in the following language:

"In all the courts of this Territory the common law, "as recognized in the United States of America, shall be "the rule of practice and decision."

Sec. 2871, C. L. 1897.

Subsequently at the same session of the legislative assembly, the following statute was enacted:

"All currents and sources of water, such as springs, "rivers, ditches, and currents of water flowing from nat- "ural sources in the Territory of New Mexico, shall be, "and they are, by this act, declared free, in order that "all persons traveling in this Territory shall have the "right to take water therefrom for their own use and "that of the animals under their charge." (Comp. Laws of N. M., 1897, Sec. 52.)

The following are also provisions of the statutes of New Mexico antedating the enactment of the common law as the rule of practice and decision:

1. "No inhabitant of this Territory shall have the right " to construct any building to the impediment of the irri- " gation of lands or fields, such as mills or any other prop- " erty that may obstruct the course of the water, as the " irrigation of the fields should be preferable to all others.

* * * * * * *

6. "All rivers and streams of water in this Territory, " formerly known as public ditches or acequias, are hereby " established and declared to be public ditches or ace- " quias."

14. " The provisions of this act shall apply only to such " ditches as have been heretofore and are known and " regarded as community ditches, under the laws of this " Territory and under the provisions of this act, shall be " construed to mean such ditches as are not private and " such as are not incorporated under the laws of this " Territory or some other State or Territory, and are " held and owned by more than two owners as tenants in " common, or joint tenants.

* * * * * * *

23. " All the inhabitants of the Territory of New " Mexico shall have the right to construct either private " or common acequias, and to take water for said acequias " from wherever they can, with the distinct understand- " ing to pay the owner through whose land said acequias " have to pass a just compensation taxed for the land " used.

24. " If the owner or owners of lands, where a new " ditch for an acequia is to be made, should ask an " exorbitant price as a compensation therefor, which " shall not be satisfactory to the owner or owners of such " acequia, it shall be the duty of the probate judge of " the county in which it may occur to appoint three skil- " ful men of well-known honesty, to make an appraise- " ment thereof and fix the compensation, which, once " done, shall be executed and without appeal."

Compiled Laws of N. M., 1897, Sections 1, 6, 14, 23, and 24.

This was all the legislation bearing on the subject until

the act of 1887, under which appellee claims its rights. These enactments clearly show that it never was the purpose of the legislature to adopt the common law as to water rights. The common law provisions were locally inapplicable.

This court in the case of Walker *v.* Railroad Company, 165 U. S. 604, in reference to the difference between the civil and common law as to surface waters, said:

"If a case came to this court from one of the States "in which the doctrine of the civil law obtains, it would "become our duty, having respect to which is a matter of "local law, to follow the decisions of that State. And in "like manner we should follow the adverse decision in a "case coming from one of the States in which the common-"law rule is recognized. New Mexico is a Territory, but "in it the legislature has all legislative power, except as "limited by the Constitution of the United States and the "organic act and the laws of Congress appertaining "thereto."

Walker *v.* Ry. Co., 165 U. S. 604.

This principle is equally applicable in determining whether the common law as to riparian rights is in force in New Mexico. We have shown that both the legislature and the courts have held otherwise. It would seem that appellants are basing their contention upon the theory that the common law in this respect obtains, although the proposition is not definitely stated. Many of the authorities cited in the brief are from States where the common law in that particular prevails.

It is, of course, important in this case. If the law of prior appropriation prevails, and we insist that it does, the appellee has the right to divert surplus water from the river. The legislature could confer upon it the power to do so, provided the diversion was for a public purpose, and a beneficial use was made of the water.

VII.

When the right of the plaintiff to exercise the right of eminent domain is judicially examined it will be found to exist.

Appellant denies this proposition, and bases his denial upon the findings of fact XV and XVI.

Finding XV: "That the plaintiff is not the owner of "any land along the line of its proposed canal or elsewhere."

Finding XVI: "That there is no evidence that the "plaintiff has any contract with or employment by any "person who is the owner of lands irrigable from said "proposed canal for the conduct of water upon such lands, "or that the owner of any lands not now irrigated from existing acequias desires or intends to irrigate such lands "from plaintiff's canal when completed." And appellants furthermore contend that the proposed use of water is not a public purpose.

We submit that there is nothing whatever in these findings to sustain the contention of the appellant that "this "is a purely speculative enterprise which seeks, by taking advantage of natural conditions arising out of the "topography of the country, and the peculiar conditions "surrounding the cultivation of the land by means of "irrigation, to compel the owners of the soil to abandon "means of irrigation entirely satisfactory to them, and "adopt others alleged to be more progressive." We respectfully submit that the same proposition might be urged against persons proposing the construction of a railroad through a country already served by other means of transportation or railroads already constructed. The compulsion must come from superior facilities or cheapened cost.

It is perfectly plain that the moment this company took or attempted to deprive any owners of existing ditches of water now appropriated and used by them, a court of equity would stop them from so doing by a writ of injunction. Appellant attempts to draw a distinction between a canal and a railroad, so far as the right to exercise the right of eminent domain is concerned. We submit that he shows neither reason nor authority for such distinction. It is just as reasonable to require a railroad company to own its own freight to be transported or to obtain its own patrons before exercising the right of eminent domain, as it is a canal company. People may well say, "When you have constructed your ditch we will talk "to you. You have no ditch now; you may never have "any. We will not contract with you until you have con- "structed it. We know that the plaintiffs are opposing, "or are about to oppose, your project, and you may never "be able to construct it for that reason. When you have "done so, we will come to you." Besides, if no patrons are secured, the taking of water will not amount to an appropriation, and the right of way, which is a mere easement, will revert to the original owners.

The appellant proceeds to quote cases to the effect that private property cannot be taken for a private purpose, under the power of eminent domain. A proposition that certainly nobody will deny. What we insist is, that it is not necessary that this company should own land of its own, or have secured contracts with prospective customers prior to its construction of its ditch.

We will consider the authorities cited in appellant's brief.

The first case simply decides that a railroad intended, not for the service of the public generally, but only a small section of it, and that some of the duties required

of it by the law of its creation could not be performed by it at all, could not be authorized to condemn property. *In re* Niagara Falls & Whirlpool Ry. Co., 108 N. Y. 384.

Noble *v.* Union River Logging Co. merely decides that the Secretary of the Interior cannot revoke an act of a prior Secretary so as to disturb vested rights. 147 U. S. 172.

The opinion of Secretary Noble, that a railroad constructed for the purpose of conveying the logs and lumber of a single milling company is not constructed for a public purpose, is unquestionably sound. If pertinent here, it is for the purpose of showing that the ownership of lands by the appellee, which it proposes to irrigate, would add nothing to its claim of right to exercise the power of condemnation.

In Lumbering Co. *v.* Johnson, 46 Pac. Rep., 790, speaking of the question of public use of a railroad, the opinion says, "that it is determined by the fact that the proposed "road is intended as a highway, for the use of the public "in the transportation of freight and passengers, and it can "make no difference that its use may be limited, by circum- "stances, to a small part of the community. Its character "is determined by the right of the public to use it, and "not by the extent to which that right is exercised. De- "camp *v.* Railroad Co. 47 N. J. Law, 43; Phillips *v.* Wat- "son, 63 Iowa, 28; 18 N. W. Rep. 659; Ross *v.* Davis, "97 Ind. 79. If everyone having occasion to use the "road as a passenger, or for the transportation of freight, "may do so, and of right may require the plaintiff to "serve him in that respect, it is a public way, although "the number actually exercising the right is very small."

Bridal Veil Lum. Co. *v.* Johnson, 46 Pacific Rep. 790; 30 Oregon, 205.

In re Deansville Cem. Assn., 66 N. Y. 569, the court decides that it is a judicial question, and that the taking of land to be laid out into cemetery lots and be sold to private parties is not a proper exercise of it.

Eureka Basin W. & M. Co., 96 N. Y. 42, decides that the power cannot be exercised to acquire real estate for the construction of wharves, which would not be open to public control or general public use.

We fail to see anything in 99 N. Y. 12. In that case the court simply held that a railroad switch built for the use of a brickyard was not for public use, but private use.

In re Rochester H. & L. Co., 110 N. Y. 119, decides that property of a steamboat company, although used for the company as a common carrier, was not held by virtue of any exercise of right of eminent domain, but was acquired as private property. It was not held upon a public trust by the authority and under the ward and control of the State, and was therefore subject to condemnation.

In re Split Rock Cable Road, 28 N. E. Rep. 506, the court, referring to the Niagara Falls case, 108 N. Y. 375, holds that "under the doctrine of this and other cases, "a possible limited use by a few, and not then as a right, "but by way of permission or favor, is not sufficient to "authorize the taking of property against the will of the "owner."

Apex Transportation Co. *v.* Garbode, 52 Pac. Rep. 573, holds that "public use" is a judicial question, and that a skid road to be built solely to facilitate the business of a private company, mainly passing and terminating at each end in the land of the company, inaccessible to the public, and not connecting at any point with a public highway, is not a road for the public use.

Con. Channel Co. *v.* C. P. R.R. Co., 51 Cal. 269, decides

that a flume to take tailings from the mine of the owner, or to enable him to deposit tailings on his land, is not a public purpose.

People *v.* Robinson, 53 Cal. 694, is to the same effect—a railroad to haul the coal of one coal company is not a railroad for a public purpose.

We respectfully submit that the appellee brings itself within the rules laid down in these and other authorities cited by appellant.

"It is settled by all the authorities that the use of water "for irrigation, when distributed by an irrigation com- "pany, is a public use."

Long on Irrigation, Sec. 4, p. 12, and authorities there cited.

"In the case of the public domain it is not essential "that the appropriator should have acquired or have the "right to acquire title to the land upon which the water "is to be used, and an alien may make a valid appropria- "tion of water on the public land, although he may be "incompetent to acquire title to the land itself. And an "alien may acquire and hold a ditch and water right "until office found as against collateral attacks by third "person other than the Government and in the absence "of forfeiture of office found may convey title to his "grantee."

Long on Irrigation, Sec. 35.
Ely *v.* Ferguson, 91 Cal. 187.
Santa Paula Water Works *v.* Peralta, 113 Cal. 38.
Toohey *v.* Campbell (Mont. 1900), 60 Pac. 396.
Thorpe *v.* Tenem Ditch Co., 1 Wash. 566; 20 Pac. 588.

Appellee does not propose to take water out of the river and carry for itself or for any particular person or persons, but to take it out, sell and deliver it to all alike, who see fit to patronize it. Its rates are required to be uniform for all. See section 17, par. 5 of the act of

1887, under which it is incorporated and claims the right of eminent domain. Irrigation is one of the declared purposes of the act and of its articles of incorporation. It needs no citation of authority to show that its rates are the subject of legislative control. We cite, however:

Munn *v.* Illinois, 94 U. S. 113.
Chicago, &c., Ry. Co. *v.* Wellman, 143 U. S. 339.
Budd *v.* N. Y. *id.* 517.
Brass *v.* Stoesr, 153 U. S. 391.
Spring Valley Co. *v.* San Francisco, 82 Cal. 286.
Same *v.* Schottler, 110 U. S. 347.

This company can be compelled by law to furnish water to all who apply for it to the extent of its capacity.

29 Am. and Eng. Enc. of Law, 19.
Hangen *v.* Albina Light Co., 21 Oregon, 411.
Price *v.* Riverside Co., 56 Cal. 31.
Combs *v.* Agricultural Ditch Co., 28 Pac. 966; 17 Colo. 146.

The Supreme Court of Arizona has very fully considered the question as to whether the taking of water for purposes of irrigation is a public purpose, and fully reviews the authorities. We cannot quote at length from the opinion, and content ourselves with citing it.

Oury *et al. v.* Goodwin, 26 Pac. 376 (Arizona).

This court, we respectfully submit, has fully settled this proposition in Fallbrook Irrigation Co. *v.* Bradley, 164 U. S. 112. We quote therefrom as follows:

"The use must be regarded as a public use, or else it "would seem to follow that no general scheme of irriga- "tion can be formed or carried into effect. In general, "the water to be used must be carried for some distance "and over or through private property which cannot be

"taken *in invitum* if the use to which it is to be put be "not public, and if there be no power to take property by "condemnation it may be impossible to acquire it at all. "The use for which private property is to be taken must "be a public one, whether the taking be by the exercise "of the right of eminent domain or by that of taxation. "Cole *v.* Le Grange, 113 U. S. 1. A private company "or corporation without the power to acquire the land *in* "*invitum* would be of no real benefit, and at any rate the "cost of the undertaking would be so greatly enhanced "by the knowledge that the land must be acquired by "purchase, that it would be practically impossible to "build the works or obtain the water. Individual enter- "prise would be equally ineffectual; no one owner would "find it possible to construct and maintain waterworks "and canals any better than private corporations or com- "panies, and unless they had the power of eminent do- "main they could accomplish nothing. If that power "could be conferred upon them it could only be upon the "ground that the property they took was to be taken for "a public purpose."

* * * * * * *

"We think it clearly appears that all who by reason of "their ownership of or connection with any portion of the "lands would have occasion to use the water, would in "truth have the opportunity to use it upon the same terms "as all others similarly situated. In this way the use, so "far as this point is concerned, is public because all per- "sons have the right to use the water under the same cir- "cumstances. This is sufficient."

Fallbrook Irrigation District *v.* Bradley, 164 U. S. 163.

The court sustained a law taxing all the real property in the irrigation district, whether directly participating in the benefits of the ditches or not, in order to pay the cost of construction. We think, therefore, that the question as to whether irrigation of lands in an arid country is a public purpose is settled.

We also think it is equally clear that so far as the organization of this appellee is concerned, under the authorities above reviewed, it brings itself clearly within the criteria that constitute a corporation discharging a duty as a public agency.

VIII.

The right to the use of water for the purposes of irrigation does not depend upon the ownership or occupation of land by the person or corporation diverting the water from a stream.

If, after it is diverted, application of it is made within a reasonable time to the irrigation of land, or any other beneficial use, either by the person or corporation diverting it, acting alone, or in conjunction with others, the appropriation becomes complete.

Appellant asserted in the court below, and still seems to contend in effect that "the present is the first instance "in which a company formed for the construction of an "irrigating canal has attempted to assert rights in a court "of justice in opposition *to the rights of owners of all "the lands subject to be irrigated by the canal.* There is "no finding of fact in this case upon which the statement "that the five persons who are the defendants in this case "are the owners of all the land to be irrigated by the "proposed canal. There is no finding as to how much "of the land, subject to such irrigation, they own or "control. The only finding of fact on this subject is the "following:

"XVIII. That some of the defendants and some of "their associates are the owners of lands through which "the plaintiff proposes to construct its canal."

We submit that the defendant must rest his case on this finding of fact, and that it does not bear out the statement in his brief. The counsel for appellant then quotes at length from Wheeler *v.* Northern Col. Irr. Co., 17 Pac. 498; 10 Colo. 582. We quote from that case the following, and assert that it is the law of this case, whenever the *question of appropriation can be properly raised.*

"But to constitute a legal appropriation, the water "must be applied within a reasonable length of time to "some beneficial use; that is to say, the diversion ripens "into a valid appropriation only when the water is utilized "by the consumer, though the priority of such appro- "priation may date, proper diligence having been used, "from the commencement of the canal or ditch." The "constitution unquestionably contemplates and sanctions "*the business of transporting water for hire from the nat-* "*ural streams to distant consumers.* The Colorado doc- "trines of ownership and appropriations (as declared in "the constitution, statutes, and decisions), necessarily "give the *carrier* of water an exceptional status; a status "different in some particulars from that of the ordinary "common carrier."

The case clearly and distinctly announces the doctrine that the carrier need not be the consumer. We submit that none of the cases cited in appellant's brief are contrary to this proposition, and none of them hold that it is necessary for the diverter and carrier to obtain his consumers before he exercises the right of eminent domain, and takes out his ditch. We respectfully submit that this question of appropriation or no appropriation cannot be raised, except between two rival and conflicting claimants of the water, not to prevent the construction of the ditch. The findings of fact by the court are to the effect that there is surplus water in the river subject to

appropriation. Whenever appellee takes water from the river, to which appellants are entitled, the law gives them an ample remedy by injunction. Until then their complaint is premature.

Many of the cases cited by appellant under this head seem to us to be inapplicable. The others seem to us to sustain the contention of appellee. We will briefly notice some of them.

Becker *v.* Marble Creek Irr. Co., 49 Pac. 893; 15 Utah, 225, holds that a prior appropriator must use the water he seeks to appropriate, and must not let it run to waste. He can hold, as against a subsequent appropriator, only what is so used.

Combs *v.* Agricultural Ditch Co., 17 Colo. 146; 28 Pac. 966, holds that diversion, not followed by beneficial use, does not amount to an appropriation. The amount diverted in excess of the user is not appropriated.

Creek *v.* Boseman Water Works Co., 15 Mont. 121; 38 Pac. 459, decides that a prior diverter of all the waters in a stream, which he did not use, could not deprive a subsequent diverter of the right to appropriate, by selling to a third party after the subsequent diversion.

Senior *v.* Anderson, 115 Cal. 496; 47 Pac. 454, is to the same effect, and also decides that the first diverter is not limited to the amount of water applied to a beneficial use during the first or second year's diversion, but has a reasonable length of time to so apply it. This, it seems to us, does not sustain appellant's contention that appellee must procure its customers in advance.

Smith *v.* Hawkins, 110 Cal.; 42 Pac. 453, holds that non-user for five years under California statute forfeits rights of diverter.

Simpson *v.* Williams, 18 Nev. 432; 4 Pac. 1213, decides that the diverter is only entitled to the amount used.

Barrows *v.* Fox, 98 Cal. 63; 32 Pac. 811, is to the same effect.

Lux *v.* Haggin, 49 Cal. 225; 10 Pac. Rep. 675, changed the law of California, and decided that riparian owners held rights in the water. Nevertheless, however, the decision holds that the water may be taken for a public use, just compensation being first made or paid into court, and that water to supply farming neighborhoods is a public use.

Vernon Irrigation Co. *v.* Los Angeles, 106 Cal. 247; 39 Pac. Rep. 762, holds that the city of Los Angeles, as successor to the Pueblo, has become the owner of all the water in the Los Angeles river, in accordance with Mexican law and by presciption. There is no such state of facts in this case.

See especially cases cited in the opinion of the supreme court of the Territory, Transcript, p. 57, citing:

Wheeler *v.* Irrigation Co., 17 Pac. 487; 10 Colo. 582.
Combs *v.* Ditch Co., 17 Colo. 148.
Broder *v.* Mining Co., 101 U. S. 274.
Ditch Co. *v.* Bennett.

The provisions of the constitution of the State of Colorado on the subject of water rights do not make the decisions of that State at all exceptional on that question. The legislature of the Territory, as we think we have shown, has full and ample power to grant the right of eminent domain for the purpose of constructing ditches, provided it does not conflict with the constitution and laws of the United States. In this connection we beg leave to suggest that southern Colorado was acquired under the treaty of Guadalupe-Hidalgo, and that very many of the largest canals in the State are within that part of the State acquired under the treaty; and some of

the cases cited for the proposition for which we are contending are located in that part of the State. If appellant's contentions were correct in reference to the treaty, it would be applicable to the provisions of the constitution of Colorado or any other State carved out of territory acquired from Mexico, as well as to territorial legislation. To sustain the proposition that a ditch company must be the owner of land to be irrigated or must have by contract previously to the construction of the ditch, thereby become the agent of the land owners, would have prevented the construction of almost all the ditches in Colorado and Arizona as well as in southeast New Mexico, and prevented the development of the arid region. For the ditch company not to be the owner of the land but to act as a *quasi* public servant makes the construction of the ditch less of a monopoly and more of a public agency.

Long on Irrigation, after speaking of Colorado, says: "In other States the statutes authorizing the exercise of the "right of condemnation have been held constitutional on "the ground that the use contemplated is a public use," citing Oury *v.* Goodwin (Ariz.) 26 Pac. 376; Ellinghouse *v.* Taylor, 19 Mont. 462; Paxton, etc., Canal and Land Co. *v.* Farmers' and Merchants' Irr. and Land Co., 45 Neb. 884.

See especially Cummings *v.* Peters, 56 Cal. 593.

The Colorado statute for condemning right of way was passed by the first legislative assembly of that Territory in 1861.

See Long on Irrigation, Sec. 62, pp. 111, 112.

Yunkers *v.* Nichols, 1 Colo. 551.

The appropriation of water does not become complete till the water has been applied to some beneficial use.

"But while the water must be diverted with the intent " to apply it to some beneficial use, it is not necessary, " to constitute a valid appropriation, that it should be " diverted for any particular use, and the use to which " the water is put may be changed without the appropri- " ator losing his right thereto. That is, water appro- " priated for one purpose may be afterwards used for " another purpose. Thus, water appropriated for irriga- " tion may be used for other purposes by one who " succeeds to the rights of the appropriator."

Long on Irrigation, Sec. 45, p. 85.

Upon what finding of fact is the contention of appellants that the taking out of this ditch is for purely a speculative purpose? It must be upon Findings XIV, XV, and XVI. That is to say, upon the propositions that appellees own no lands, and have not by contract become the agent of land owners. We think we have shown that these conditions are not prerequisites to the exercise of the power of eminent domain. But what right have the appellants to complain of the speculative character of the enterprise? If they are prior appropriators their rights are secure against any injury from speculation on the part of the appellee. If the appellee can secure customers, and apply the whole or any part of the surplus water, which the court below has found to exist, to a beneficial use, why should the appellants be heard to complain if not compelled to patronize the appellee's ditch?

This company must make its rates uniform; it is subject to legislative regulation as to its rates. If it secures an application of the surplus water to a beneficial use through its patrons, the enterprise is a success and a public benefit, otherwise not. How can it be called speculative, any more than a railroad, a manufacturing establishment, or any other business undertaking?

IX.

The appellants cannot assume to represent the community ditches referred to in the record. We insist that they can represent no interests but their own, and that only so far as to litigate the right of the appellee to go on their land, survey its line, and exercise the right of eminent domain.

The legislature has made these community ditches corporations, and authorized them to sue and be sued, and suits affecting the taking of the water should be in their names.

"All community ditches or acequias now constructed or "hereafter to be constructed in this territory, shall, for the "purposes of this act, be considered as corporations or "bodies corporate, with power to sue or be sued as such."
Compiled Laws N. M. (1897), Sec. 8, act of 1889.

X.

The appellants have shown no right to represent any interests except their own.

The court below went further than it should have gone in recognizing the defendants as representing any parties in interest other than themselves.

The cross complaint prays for an injunction against the exercise of the right of eminent domain, and also the diversion of the water by appellee.

The cross complaint was based upon the propositions that there was no surplus water to be diverted, and that appellants and their associates as riparian proprietors were entitled to the use of all the water in the river. The court, by findings of fact from IV to XIII, inclusive,

Transcript, pp. 34–5, disposes of this contention of appellants.

Upon what theory of law can the five appellants who were parties to the cross-bill assume to represent thousands of people living along the Rio Grande, below the proposed terminus of this ditch? If they can do this for the purpose of protecting these thousands against the taking of water, which they own as prior appropriators, no reason suggests itself why the guardianship of these five persons should not be extended over the other thousands living along the Rio Grande in Texas and the Republic of Mexico. What concern have these five appellants with the injury, if any, which persons living below the line of the proposed ditch may suffer? We deny that it has been shown that they would suffer any injury at the hands of the appellee.

Not one of these persons would be bound by any decree against them in this cause as to rights appellee can exercise under its charter and the findings of fact made by the court. The proposition that courts punish persons not parties to the record, made by appellants, has no application here. The reason given for punishment in such cases is that the violation is with notice of the injunction and a contempt of court. We undertake to say that such a person is not bound by anything else in the decree not relating to the injunction.

In re Lennon, 166 U. S. 554.

Appellant cites two decisions of this court for the proposition that these five persons can represent thousands of other persons.

The first case was a suit for the distribution of a fund or property claimed by several thousand preachers. The

suit could not be proceeded with unless all parties interested were before the court.

Smith *v.* Swormstead, 16 How. 302.

The other case was a suit in the Court of Claims, brought by "Commissioners" selected by a large portion of the Cherokee Indians to bring suit for a fund which belonged to the Indians as a community.

United States *v.* Old Settlers, 148 U. S. 480.

A very different situation from the position of appellants. No proof shows that they have been selected by anybody. It was not necessary for the assertion and protection of their own rights as claimed by them, and the determination of them by the court that everybody else should be represented before the court. The persons whom the court below refused to recognize them as representing are not similarly situated. No relief can be granted restraining appellee from diverting water under the findings of fact that there is a surplus of water subject to appropriation. Under this state of facts appellants will not be heard to say that you may have the right to divert and appropriate water as to us, but we represent several thousand people, from twenty to a thousand miles below your proposed ditch, and as you might injure them we ask that you be enjoined on that account. Will it not be time enough for the courts to interfere in behalf of these thousands when they show some injury to their rights, and come into court and ask for it?

In the opinion in Smith *v.* Swormstead, *supra*, we find the following:

"Story, J., in his valuable treatise on equity pleadings, "after discussing this subject with his usual research and "fullness, arranges the exceptions to the general rule as

" follows: 1. Where the question is one of a common or " general interest, and one or more sue or defend for the " benefit of the whole. 2. Where the parties form a vol- " untary association for public or private purposes, and " those who sue or defend may fairly be presumed to rep- " resent the rights and interests of the whole; and 3. " Where the parties are very numerous, and though they " have or may have separate and distinct interests, yet it " is impracticable to bring them all before the court.

" In this latter class, though the rights of the several " persons may be separate and distinct, yet there must be " a common interest or a common right which the bill " seeks to establish or enforce. As an illustration, bills " have been permitted to be brought by the lord of a " manor against some of the tenants, and *vice versa*, by " some of the tenants, in behalf of themselves and the " other tenants, to establish some right, such as suit to a " mill, or right of common, or to cut turf. So by a par- " son of a parish against some of the parishioners to es- " tablish a general right to tithes, or, conversely, by some " of the parishioners in behalf of all to establish a pa- " rochial modus.

" In all cases where exceptions to the general rule are " allowed, and a few are permitted to sue and defend on " behalf of the many, by representation, care must be " taken that persons are brought on the record fairly " representing the interest or right involved, so that it " may be fully and honestly tried."

See also Mayor, etc., of Georgetown *v.* Alex. Canal Co., 12 Peters, 94.

It seems too plain to require discussion that these thirteen or more community ditches, thus made corporations or *quasi* corporations, should bring any suits for the protection of the rights which the persons, members of the corporation, or community, may have in water flowing through these ditches. It seems equally plain that all of these ditch corporations could be made actual parties to a suit, and that all that was properly involved

in this suit was appellants' right to exercise the right of eminent domain. As to the persons below the terminus of the ditch, the findings of the court that there is water in the river subject to appropriation is equally as conclusive as they are upon the appellants themselves.

We respectfully submit that there is no error in the record, and the decree of the court below should be affirmed.

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